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6 IN THE UNITED STATES DISTRICT COURT  
7  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 EDITH MACIAS, et al.,

No. C-07-03437 JSW (EDL)

10 Plaintiffs,

**REPORT AND RECOMMENDATION TO  
DENY DEFENDANTS' MOTION TO BE  
DECLARED PREVAILING PARTIES  
AND FOR AN AWARD OF ATTORNEYS'  
FEES**

11 v.

12 THOMAS J. TOMANEK, et al.,

13 Defendants.  
14 \_\_\_\_\_/

15 Plaintiffs are former residential tenants of a large apartment complex in Fremont who entered  
16 into lease agreements with Defendant Thomas Tomanek (the property owner) and Defendant  
17 Garibaldi Company (the property manager). Plaintiffs alleged that Defendant Garibaldi committed  
18 mail fraud in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18  
19 U.S.C. § 1961, et seq., by making false representations in connection with obtaining and retaining  
20 the tenants' security deposits and demanding payments for ordinary wear and tear when tenants  
21 moved out despite California law and the leases' provisions to the contrary. First Am. Compl. ¶ 1.  
22 The remainder of the claims against Garibaldi and all of the claims against Tomanek arose under  
23 California law.

24 On January 8, 2008, Judge White granted Defendants' Motions to Dismiss with prejudice,  
25 holding that Plaintiffs failed to state a claim for a RICO violation because Plaintiffs failed to allege  
26 mail fraud as the alleged mailings occurred after Defendant had already fraudulently obtained the  
27 security deposits, and Plaintiffs were not injured by the mailings documenting the withholding of the  
28 security deposits. See Jan. 8, 2008 Order (docket number 35). Having dismissed the sole federal  
claim, Judge White declined to exercise supplemental jurisdiction over the state law claims. Shortly

1 thereafter, Tomanek brought a motion in which Garibaldi joined seeking an award of fees under a  
 2 provision of the lease agreements authorizing fees to the prevailing party in an action to enforce the  
 3 terms of the lease. That motion was referred to this Judge for a report and recommendation pursuant  
 4 to Civil Local Rule 72-1. The Court held a hearing on March 4, 2008 and now issues the following  
 5 Report and Recommendation.

6 Defendants argue that California Civil Code section 1717 entitles them to fees as the  
 7 prevailing party:

8 In any action on a contract, where the contract specifically provides that attorney's  
 9 fees and costs, which are incurred to enforce that contract, shall be awarded either to  
 10 one of the parties or to the prevailing party, then the party who is determined to be  
 11 the party prevailing on the contract, whether he or she is the party specified in the  
 12 contract or not, shall be entitled to reasonable attorney's fees in addition to other  
 13 costs.

14 Cal. Civ. Code § 1717(a). Section 1717, however, only applies to actions "on a contract" and not to  
 15 tort claims. See Santisas v. Goodin, 17 Cal.4th 599, 615 (1998) ("If an action asserts both contract  
 16 and tort or other noncontract claims, section 1717 applies only to attorney fees incurred to litigate  
 17 the contract claims."); see also Exxess Electronix v. Heger Realty Co., 64 Cal.App.4th 698, 708  
 18 (1998) ("Civil Code section 1717 does not apply to tort claims; it determines which party, if any, is  
 19 entitled to attorneys' fees on a contract claim only. [citations omitted]. As to tort claims, the  
 20 question of whether to award attorneys' fees turns on the language of the contractual attorneys' fees  
 21 provision, i.e., whether the party seeking fees had 'prevailed' within the meaning of the provision  
 22 and whether the type of claim is within the scope of the provision. [citation omitted]. This  
 23 distinction between contract and tort claims flows from the fact that a tort claim is not 'on a  
 24 contract' and is therefore outside the ambit of section 1717."). Santisas makes clear that the  
 25 statutory provision governing actions "on a contract" must be narrowly interpreted; a tort claim is  
 26 not "on a contract" simply because it involves a contract. See Santisas, 17 Cal.4th at 615; see also  
 27 Restatement (Second) of Torts § 530 cmt. 1(c) (stating that a tort action for fraud arising out of a  
 28 contract will lie whether or not the underlying contract is enforceable). Here, although the RICO  
 claim involved a contract, it sounded in fraud, not in contract. Therefore, the RICO claim is not "on  
 a contract" for purposes of section 1717.

Although In re Baroff, 105 F.3d 439 (9th Cir. 1997) viewed California caselaw at the time as

1 supporting the application of section 1717 to claims that merely involved a contract, the Ninth  
 2 Circuit did not have the benefit of the definitive clarification of California law provided by the  
 3 California Supreme Court in Santisas one year later. See In re Davison, 289 B.A.P. 716, 724 (9th  
 4 Cir. BAP 2003) (declining to follow the holding in In re Baroff, 105 F.3d 439 (9th Cir. 1997) that  
 5 “California courts liberally construe “on a contract” to extend to any action “[a]s long as an action  
 6 ‘involves’ a contract and one of the parties would be entitled to recover attorney fees under the  
 7 contract if that party prevails in its lawsuit . . . .;” because “Santisas was decided after Baroff, we  
 8 will follow its holding and narrowly apply CCC § 1717 and approve attorney’s fees only if the  
 9 action involves a contract claim. [citation omitted].”). In any case, Baroff is distinguishable because  
 10 the bankruptcy court there had to determine the validity of a settlement agreement in order to  
 11 determine dischargeability. Here, the district court dismissed Plaintiffs’ RICO claim without  
 12 reaching the state law claims, much less deciding the interpretation or validity of the lease  
 13 agreements.

14 Furthermore, in declining to exercise supplemental jurisdiction over the state law claims,  
 15 including the only one sounding in contract (for breach of the covenant of good faith and fair  
 16 dealing), the district court expressly observed: “The Court notes that Plaintiffs are not without a  
 17 potential remedy in state court.” Jan. 8, 2008 Order at 6:8-9. As Judge White anticipated, Plaintiffs  
 18 have re-filed their breach of contract and tort claims in state court. Accordingly, Defendants are not  
 19 the prevailing parties on a contract claim under section 1717. See Idea Place Corp. v. Fried, 390  
 20 F.Supp.2d 903, 905 (N.D. Cal. 2005) (“Further, this Court’s dismissal for lack of subject matter  
 21 jurisdiction in federal court did not foreclose the possibility that Plaintiff could pursue its contract  
 22 claims in state court. Thus, it remains to be seen which entity is the ‘prevailing party’ on Plaintiff’s  
 23 contract action.”); N.R. v. San Ramon Valley Unified School Dist., 2006 WL 1867682 (N.D. Cal.  
 24 July 6, 2006) (“The Court dismissed plaintiffs’ breach of contract claim for lack of jurisdiction, and  
 25 made no determination whatsoever as to the merits of the claim. Plaintiffs remain free, after this  
 26 Court’s decision, to pursue their breach of contract claims in state court . . . . Thus, although  
 27 defendant ‘prevailed’ in the sense that it obtained a dismissal of that claim, defendant’s victory is  
 28 not a complete one because plaintiffs may pursue that claim in state court.”); cf. Fairchild v. Park, 90

1 Cal.App.4th 919, 925-26 (2001) (fees recoverable under section 1717 as tenants' claims sounded in  
2 contract because they were based on the breach of the warranty of habitability that is contained in  
3 every lease, and where the lease provided for attorneys' fees "in any action . . . for the breach of any  
4 of the covenants contained in this lease . . .").

5 Because Plaintiff's RICO claim is not "on a contract" under section 1717, the Court must  
6 look to the specific language of the fee provision in the leases to determine whether fees are  
7 recoverable for the RICO claim. See Cal. Code Civ. Proc. § 1021 ("Except as attorney's fees are  
8 specifically provided for by statute, the measure and mode of compensation of attorneys and  
9 counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or  
10 proceedings are entitled to their costs, as hereinafter provided."); Xuereb v. Marcus & Millichap, 3  
11 Cal.App.4th 1338, 1341 (1992) (Section 1021 is not limited to contract actions; the parties may  
12 validly contract regarding fees). The fee provision in Plaintiffs' lease agreements stated:

13 Tenant acknowledges that if any legal action or proceeding to enforce the terms of  
14 this agreement is necessary, the prevailing party is entitled to recovery of a  
15 reasonable attorney fee and costs of such action in addition to all other amounts  
owed, to the extent authorized by state law.

16 Allman Decl. Ex. A at 2. This provision narrowly confines fee awards to actions brought to enforce  
17 the terms of the agreement.

18 While at first blush, Plaintiffs' RICO claim might appear to be brought to enforce the  
19 agreement insofar as it would impose statutory liability on Defendants for acting contrary to the  
20 lease provision regarding ordinary wear and tear, under the applicable caselaw such a claim does not  
21 come within this narrow fee provision. "Where a contract authorizes an award of attorney fees in an  
22 action to enforce any provision of the contract, tort claims are not covered . . . . The language  
23 'brings an action to enforce the contract' is quite narrow." Gil v. Mansano, 121 Cal.App.4th 739,  
24 743 (2004). Defendants' reliance on Chang v. Chen, 95 F.3d 27 (9th Cir. 1996) in support of fees  
25 is misplaced; to the contrary, Chang supports a denial of fees here. The contractual fees provision at  
26 issue in Chang was much broader than here:

27 [i]n the event legal action is instituted by the Broker(s), or any party to this  
28 agreement, to enforce the terms of this agreement, or *arising out of the execution of*  
*this agreement or the sale*, or to collect commissions, the prevailing party shall be  
entitled to receive from the other party a reasonable attorney fee to be determined by

the court in which such action is sought.

Chang, 95 F.3d at 28 (alteration in original). The court held that: “The ‘arising out of’ language . . . is broad enough to encompass both contract and tort claims.” Id. at 28. Nonetheless, the court denied fees to the defendant for successfully defending against the RICO claims:

Here, the RICO action did not arise out of any one of the individual contracts. Rather, RICO’s pattern requirement could be satisfied only because there were three land transactions. Although each of the three land sale contracts contained a provision permitting the prevailing party to recover attorneys’ fees, no plaintiff signed all three contracts. Each plaintiff signed only one contract. Because each contract permitted an award of attorneys’ fees only if the action arose out of the land transaction relating to that contract, and because the alleged RICO pattern did not result from any one contract, we deny Prevailing Defendants’ motions for attorneys’ fees.

Chang, 95 F.3d at 29. Similarly, here, Plaintiffs’ RICO action was predicated on a pattern of various individual tenants (and co-tenants) each giving Defendants security deposits and subsequently receiving a series of individual fraudulent mailings. See First Am. Compl. ¶ 71. As in Chang, no one tenant signed the multiple leases or received the multiple mailings alleged to constitute a pattern of racketeering activity through mail fraud.

The reasoning in Stitt v. Williams, 919 F.2d 516, 520, 529-30 (9th Cir. 1990) is also instructive. As here, the contractual fee provision in Stitt stated: “In the event any litigation is commenced to enforce this agreement, the parties hereto agree that the prevailing party in such litigation shall be entitled to reasonable attorney’s fees and other costs and expenses, to be fixed by the court as part of the costs of said action, whether such litigation proceeds to judgment or not.” In denying fees under this provision in a case involving RICO (and only authorizing fees under a different, much broader provision for any action in any way pertaining to the partnership agreement), the Ninth Circuit held that:

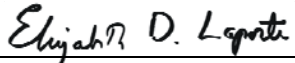
Appellees cannot recover attorneys’ fees or costs under this provision because appellants brought this action not to “enforce” the limited partnership agreements but rather to collect damages based on the allegedly fraudulent conduct of Dale in connection with the partnerships’ formation and operation or, alternatively, to rescind or reform the partnership agreements.

Stitt, 919 F.2d at 529-30.

Accordingly, the Court recommends denying Defendants’ Motion to be Declared Prevailing Parties and for an Award of Attorneys’ Fees. Any party may serve and file specific written

objections to this recommendation within ten (10) business days after being served with a copy. See  
28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); Civil L.R. 72-3. Failure to file objections within the  
specified time may waive the right to appeal the District Court's order.

Dated: March 11, 2008

  
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ELIZABETH D. LAPORTE  
United States Magistrate Judge